Plenitude Holdings Sdn Bhd v Tan Sri Khoo Teck Puat & Anor

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO 22–32–89
PS GILL J
25 MARCH 1994

Contract *— Damages — Wrongful termination — Fees paid to consultants and surveyors in reliance of contract — Whether recoverable*

Contract *— Damages — Loss of profits — Defendants aware of purpose for which land was purchased — Contracts Act 1950 s 74*

Contract *— Damages — Loss of profits — Assessment — Comparison approach — Factors affecting loss of profits*

Contract *— Damages — Loss of opportunity — Loss of cash flow investment — Whether allowable*

Contract *— Damages — Loss of future profits — Whether exemplary damages — Whether allowable*

Contract *— Damages — Interest — Wrongful forfeiture of deposit — Whether loss of interest on deposit recoverable*

Contract *— Damages — Interest — Rate of interest — Date of commencement — Civil Law Act 1956 s 11 — Rules of the High Court 1980 O 42 r 12*

By a sale and purchase agreement ('the agreement'), the second defendant, Rumah Nanas Estate Sdn Bhd ('the vendor'), agreed to sell to the plaintiffs, Plenitude Holdings Sdn Bhd ('the purchaser'), a piece of estate land ('the land') for RM47,939,958. The land was purchased for the purpose of development and the vendor was aware of this fact. The first defendant promised to obtain a loan for the plaintiffs and gave an undertaking that in the event that he was unable to do so, the defendants would join the plaintiffs in a joint venture to develop the land. The purchasers paid a deposit of RM4,793,995.80 but failed to pay the balance sum within the stipulated period. The vendor then terminated the agreement and forfeited the deposit. The trial judge came to the conclusion that the termination of the agreement by the vendor was not valid and ordered specific performance of the agreement for the sale and purchase of the land, with damages to be assessed for wrongful termination and breach of undertaking. [See [1992] 2 MLJ 68.] The defendants appealed to the Supreme Court which dismissed the appeal and affirmed the judgment of the High Court. [See [1993] 1 MLJ 113.]

In this application for assessment of damages which was made pursuant to the High Court order, the damages which fell to be assessed were, inter alia, for wrongful termination of the agreement,

loss of profits on the development project and interest on the deposit of RM4,793,995.80 paid by the purchaser to the vendor. A

Held, awarding the plaintiff approximately RM16.7m in damages, excluding interest:

(1) As for the claim under wrongful termination of the agreement, the fees paid to the consultants and surveyors amounting to RM62,783.50 were allowed on the ground that the purchaser had submitted sufficient proof by submitting the relevant invoices. Other fees and the solicitors' costs were not allowed. B

(2) The defendants were fully aware that the plaintiffs had purchased the land for the purpose of development and that by not honouring their undertakings, the plaintiffs would be unable to proceed with the development and thereby suffer loss of profit on the proposed housing project. The loss suffered by the plaintiffs was a natural and probable result of the defendant's breach of the contract and any loss of profit normally to be expected which the developer would have earned but for the breach, is an allowable claim under the rule in *Hadley v Baxendale*.[1] C D

(3) The 'comparison' approach relied on by the vendor in assessing the loss of profits of the purchaser was not without flaws as, inter alia, the computation did not take into account the increase in building costs. Taking all factors into consideration, the court therefore took an average of the two figures provided by both the vendor and purchaser relating to the loss of profits, which amounted to RM19,113,500. However, there could be adverse conditions affecting the anticipated profits and a deduction of 30% should be applied thereby reducing the sum to a round figure of RM13.5m. E F

(4) There was no basis for the claim under loss of opportunity cost of RM2,869,300 and accordingly, it was disallowed. However, in regard to cash flow investment, both the vendor's and purchaser's witnesses agreed that there was such a loss. The average of the two figures provided by the witnesses would amount to RM867,969 and this sum was therefore allowed for the loss suffered in regard to cash flow investment. G

(5) In regard to the claim for future profits, which in reality amounts to a claim for exemplary damages, the purchasers had not established their claim in accordance with the principles laid down in *Rookes v Barnard*[3] and accordingly, the claim for RM5m was disallowed. H

(6) The sum of RM4,793,995.80 being the 10% deposit paid by the plaintiffs to the defendants had been wrongfully forfeited and as such, the plaintiffs had been denied the use of that sum of money. The defendants by wrongfully terminating the agreement must in all fairness compensate the plaintiffs. The interest of 8%pa should commence from the date the agreement was wrongfully terminated, ie 12 December 1988, till the balance of the purchase price was I

paid by the plaintiffs to the defendants on 31 December 1992, which amounts to RM2,279,290.52.

(7) Interest was further awarded at the rate of 5%pa on all the awards of damages (except for the sum of RM2,279,290.52) from the date of service of the writ until the date of judgment under s 11 of the Civil Law Act 1956 and thereafter at the rate of 8%pa until satisfaction under O 42 r 12 of the Rules of the High Court 1980.

[Bahasa Malaysia summary

Melalui suatu perjanjian jualbeli ('perjanjian itu'), defendan kedua, Rumah Nanas Estate Sdn Bhd ('penjual'), telah bersetuju menjual kepada plaintif, Plenitude Holdings Sdn Bhd ('pembeli'), sebidang tanah estet ('tanah itu') pada harga RM47,939,958. Tanah itu telah dibeli untuk tujuan pembangunan dan penjual sedar akan fakta ini. Defendan pertama telah berjanji untuk mendapatkan suatu pinjaman bagi plaintif dan memberi akujanji bahawa jika beliau gagal berbuat demikian, defendan akan bergabung dengan plaintif di dalam suatu usaha sama untuk memajukan tanah itu. Pembeli telah membayar deposit sebanyak RM4,793,995.80 tetapi gagal untuk membayar baki jumlah itu dalam tempoh yang ditetapkan. Penjual kemudiannya telah menamatkan perjanjian itu dan melucuthakkan deposit itu. Hakim perbicaraan telah membuat keputusan bahawa penamatan perjanjian itu oleh penjual tidak sah dan memerintahkan pelaksanaan spesifik perjanjian jualbeli tanah itu, dengan ganti rugi yang akan ditaksirkan untuk penamatan salah dan kemungkiran akujanji. [Lihat [1992] 2 MLJ 68.] Defendan membuat rayuan kepada Mahkamah Agung yang telah menolak rayuan itu dan mengesahkan penghakiman Mahkamah Tinggi. [Lihat [1993] 1 MLJ 113.]

Di dalam permohonan untuk pentaksiran ganti rugi ini yang dibuat di bawah perintah Mahkamah Tinggi, ganti rugi yang perlu ditaksirkan adalah, antara lain, bagi penamatan salah perjanjian itu, kehilangan keuntungan untuk pembangunan project itu dan faedah atas deposit sebanyak RM4,793,995.80 yang telah dibayar oleh pembeli kepada penjual.

Diputuskan, mengawardkan plaintif lebih kurang RM16.7 juta sebagai ganti rugi, tidak termasuk faedah:

(1) Mengenai tuntutan untuk penamatan salah perjanjian itu, fee yang dibayar kepada perunding dan juruukur sebanyak yang berjumlah RM62,783.50 dibenarkan atas dasar bahawa pembeli telah mengemukakan bukti yang mencukupi dengan mengemukakan invois yang berkenaan. Fee dan kos peguamcara yang lain tidak dibenarkan.

(2) Defendan-defendan sedar bahawa plaintif telah membeli tanah itu untuk tujuan pembangunan dan bahawa dengan tidak menghormati akujanji mereka, plaintif tidak dapat menjalankan pembangunan itu dan dengan demikian akan mengalami kerugian keuntungan atas projek perumahan yang dicadangkan itu. Kerugian

yang dialami oleh plaintif merupakan akibat yang biasa dan mungkin daripada kemungkiran kontrak itu oleh penjual dan sebarang kehilangan keuntungan yang biasanya boleh dijangka akan diperolehi oleh pemaju jika kemungkiran itu tidak berlaku, merupakan tuntutan yang dibenarkan di bawah rukun di dalam *Hadley v Baxendale.*[1]

(3) Pendekatan 'perbandingan' ('comparison') yang penjual bergantung kepada untuk mentaksirkan kehilangan keuntungan pembeli bukan tanpa kecacatannya kerana, antara lain, ia tidak mengambil kira kenaikan di dalam kos pembinaan. Dengan mengambil kira semua faktor, mahkamah dengan itu mengambil purata dua jumlah yang dikemukakan oleh kedua-dua penjual dan pembeli berkenaan dengan kehilangan keuntungan, yang berjumlah sebanyak RM19,113,500. Bagaimanapun, mungkin terdapat keadaan yang mejejaskan keuntungan yang dijangka itu dan suatu potongan sebanyak 30% harus dikenakan dan dengan demikian jumlah itu dikurangkan kepada suatu nombor bulat sebanyak RM13.5 juta.

(4) Tidak ada asas bagi tuntutan untuk kehilangan kos peluang sebanyak RM2,869,300 dan dengan demikian, ia tidak dibenarkan. Bagaimanapun, berkenaan dengan pelaburan aliran tunai, kedua-dua saksi penjual dan pembeli bersetuju bahawa terdapat suatu kehilangan sedemikian. Purata dua jumlah yang diberikan oleh saksi-saksi itu berjumlah sebanyak RM867,969 dan oleh itu jumlah ini dibenarkan untuk kehilangan yang dialami berkenaan dengan pelaburan aliran tunai.

(5) Berkenaan dengan tuntutan bagi keuntungan masa depan, yang sebenarnya merupakan suatu tuntutan bagi ganti rugi teladan, pembeli tidak membuktikan tuntutan mereka mengikut prinsip yang ditetapkan di dalam *Rookes v Barnard*[3] dan dengan demikian, tuntutan bagi jumlah RM5 juta tidak dibenarkan.

(6) Jumlah sebanyak RM4,793,995.80 iaitu deposit 10% yang telah dibayar oleh plaintif kepada defendan telah dilucuthakkan secara salah dan oleh itu, plaintif tidak dapat menggunakan jumlah wang itu. Dengan menamatkan perjanjian itu secara salah, defendan mesti membayar pampasan kepada plaintif untuk berlaku adil. Faedah pada kadar 8% setahun harus bermula dari tarikh perjanjian itu ditamatkan secara salah, iaitu ie 12 Disember 1988, sehingga baki harga belian telah dibayar oleh plaintif kepada defendan pada 31 Disember 1992, yang berjumlah sebanyak RM2,279,290.52.

(7) Faedah selanjutnya diawardkan pada kadar 5% setahun ke atas semua award ganti rugi (kecuali jumlah RM2,279,290.52) dari tarikh penyampaian writ hingga tarikh penghakiman di bawah s 11 Akta Undang-Undang Sivil 1956 dan seterusnya pada kadar 8% setahun hingga tarikh penyelesaian di bawah A 42 k 12 Kaedah-Kaedah Mahkamah Tinggi 1980.]

[*Editorial Note*: The defendants have appealed to the Supreme Court.]

Notes

For a case on interest payable on damages, see 3 *Mallal's Digest* (4th Ed) para 1035.

For cases on damages, see [1992] Mallal's Digest 565–570.

Cases referred to

1 *Hadley v Baxendale* (1854) 9 Ex 341 (refd)

2 *Bank Bumiputra Malaysia Bhd Kuala Terengganu v Mae Perkayuan Sdn Bhd & Ors* [1993] 2 MLJ 76 (distd)

3 *Rookes v Barnard* [1964] AC 1129; [1964]1 All ER 367; [1964] 2 WLR 269 (refd)

Legislation referred to

Contracts Act 1950 s 74

Wong Kim Fatt (*Lee Fei Fung* with him) (*Gulam & Wong*) for the plaintiffs.

Porres Royan (*Robert Lai* with him) (*Jackson & Masacorale*) for the defendants.

PS Gill J: This application for assessment of damages is being made pursuant to an order made by me in my judgment delivered at the conclusion of the trial. The brief facts of the case are that by a sale and purchase agreement dated 20 August 1984, the second defendant, Rumah Nanas Estate Sdn Bhd, agreed to sell to the plaintiffs, Plenitude Holdings Sdn Bhd, a piece of estate land at a price of RM47,939,958. The plaintiffs paid a deposit of RM4,793,995.80 but failed to pay the balance sum within the stipulated period of the contract, or within the extended completion period. The second defendant then terminated the said agreement and forfeited the said deposit.

Having heard all the evidence, I came to the conclusion that the termination of the contract by the second defendant was not valid and ordered specific performance of the contract for the sale and purchase of the land in question. [See [1992] 2 MLJ 68.] The defendants appealed against my judgment and the Supreme Court dismissed the defendants' appeal and affirmed my judgment. [See [1993] 1 MLJ 113.]

In my judgment, I held that the first defendant, of his own volition and acting for and on behalf of the second defendant, had promised to secure a loan for the plaintiffs and that in the event that such a loan was not secured, the first defendant had given an undertaking that the defendants would join the plaintiffs in a joint venture scheme to develop the land. The court granted the plaintiffs the remedy of specific performance of the sale and purchase agreement with the damages to be assessed and paid for by the defendants to the plaintiffs, for wrongful termination of the agreement and for breaches of their undertakings with costs. For easy reference, the relevant order of the court dated 8 April 1993 reads as follows:

(5) The second defendant shall pay to the plaintiffs damages to be assessed for wrongful termination of the said agreement dated 20 August 1984 with costs.
(6) The first and second defendants shall pay to the plaintiffs damages to be assessed for breaches of their undertakings with costs.

The consequences of a breach of contract are governed by s 74 of the Contracts Act 1950 which states as follows:

(1) When a contract has been broken, the party who suffers by the breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.
(2) Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Any loss of profit normally to be expected which the developer would otherwise have earned, but for the breach and delay caused, is an allowable claim under the rule in *Hadley v Baxendale*.[1]

The plaintiffs claim that their loss of profit and damages arose out of and were directly caused by the breaches of undertakings by both the defendants. As such, the defendants knew of the consequences of the breach of contract as they were fully aware that the plaintiffs had purchased the land for the purpose of development.

At this trial, the plaintiffs called Mr Wong Chap Fah as their witness. He had also filed two affidavits dated 28 April 1993 and 22 June 1993. The defendants also filed an affidavit denying that they were liable for the claims made against them. Their affidavit was sworn by a director of the company, Mdm Rahmah bte Haji Jaafar and it was dated 17 June 1993. Apart from the affidavits filed by the defendants, the defendants called two witnesses, namely, Ms Lim Wooi Hwee and Mr K Parampathy.

The plaintiffs' claim for damages is for wrongful termination of the agreement, breaches of undertaking, loss of profit on the housing project, and interest on the deposit of RM4,793,995.80. This amount was the 10% deposit paid by the plaintiffs to the second defendant towards the purchase price of the land in question.

In regard to the claim under wrongful termination of the agreement, I would allow the following items on the ground that the plaintiff has submitted sufficient proof by submitting the relevant invoices.

Fees payable to the following:

(i) Ling & Wong Perunding Sdn Bhd amounting to RM31,000; and
(ii) Jurukur Selatan amounting to RM31,783.50.

I disallow all claims in regard to the following items:

(iv) [fees payable to] Lim & Hooi amounting to RM22,500;
(v) costs paid to Gulam & Wong amounting to RM348,651; and
(vi) outstanding costs payable to Gulam & Wong amounting to RM700,000.

I now deal with the plaintiffs' claim under the heading of 'Breaches of undertakings'. The principal claim under this category is a claim for loss of profit on the housing project.

It must be borne in mind that the court made a finding of fact at the conclusion of the trial that the first defendant had promised to secure a loan for the plaintiffs and in the event such a loan was not secured, the first defendant had given an undertaking that the defendants would joint the plaintiffs in a joint venture scheme to develop the said land.

The plaintiffs allege that as a result of the undertaking by the first defendant and the failure of the defendants as a whole to either secure a loan for the plaintiffs or enter into a joint venture scheme with the plaintiffs, the plaintiffs have suffered a loss of profit on the housing project.

It is reasonable to assume that the defendants were aware of the fact that by not honouring their undertakings, the plaintiffs would be unable to proceed with the development of the land and thereby suffer loss of profit on the proposed housing project.

In regard to the quantum of damages, the plaintiffs' witness, Mr Song Chap Fah (PW1), stated in his evidence that the housing project involved the construction of houses on the 1,000 acres of land that the plaintiffs had contracted to purchase from the second defendant. The housing project was to be named Pekan Yayasan. The land was projected to develop into five phases comprising 11,547 housing units of various types, as well as sales of land for industrial purposes. In pursuance of their intention to develop the said land, the plaintiffs had obtained the services of various persons, such as surveyors, engineers, project managers, and other technical personnel in order to prepare for the conversion, sub-division and the preparation of the layout plan of the said land in question.

The final layout plan was approved in 1987. The plaintiffs genuinely proceeded with their plan to develop the said land on the strength of the undertakings given by the defendants. This fact was not denied by the defendants. PW1 was undoubtedly a competent and an experienced witness to give evidence on behalf of the plaintiffs. PW1 stated that in 1987, the necessary approvals were obtained for the development of the land into a housing scheme. He also stated that 1987 was the perfect time to embark on development of the land into a housing scheme.

Sometime in the middle of 1987, the plaintiffs and the defendants after some discussions, agreed to implement a joint venture scheme between the respective parties. The plaintiffs would hold a 10% share in that scheme and the defendants would hold a 90% share.

As the plaintiffs had a 10% share in the joint development scheme with the defendants, the profits derived from the scheme would accordingly be 10% of the total gross profit before tax. PW1 stated that the total sales revenue projected by him was RM645,935,000. The total expenditure projected was RM421,625,000 and the gross profit before tax would amount to RM224,300,000. The plaintiffs' share of the profit would amount to 10% x RM224,300,000 or RM22,430,000.

The defendants called a witness, Lim Wooi Hwee (DW1). She stated that she was a certified public accountant and was attached to a firm of accountants since 1979. She had prepared a report in regard to her findings which was marked as D4. In her evidence and her report, she stated that if the project had commenced in 1988, the profit of the plaintiffs would be RM15,797,000 and this would be the loss of profit of the plaintiffs.

Before the court comes to any definite conclusion as to the veracity and reliability of the evidence given by PW1 and DW1, it is appropriate to examine the reasons given by the two witnesses for their respective conclusions.

PW1 stated that apart from being a certified accountant, he was also a cost accountant familiar with the accounts and financial position of the plaintiffs' company, and had prepared the financial papers himself in 1989. Apart from being an accountant, he also had considerable experience in the housing industry. He had been involved in a large housing project named Taman Skudai Baru in Johor Bahru for a period of four years prior to 1989. This project involved about 840 units. PW1 had relied on his experience and personal knowledge in preparing his reports, apart from the fact that he was in Johor Bahru for a large number of years prior to 1989, and therefore had ample opportunity to have a firsthand knowledge of the conditions prevailing in the housing industry.

DW1 stated in her evidence that she was a certified accountant having assisted receivers and managers in supervizing some abandoned housing projects. In Johor, she was involved in the revival of a project named Taman Mewah in Senai. This project involved a total number of 107 units. In preparing her computation and figures regarding the cost and construction of building, DW1 admitted in her evidence that she had no personal knowledge of the construction or building cost and that she had prepared her report on the findings supplied to her by quantity surveyors and architects whose evidence was not before the court. DW1 stated further that she did not go into a very detailed computation, although she claimed that she had adequate time. The report, D4, although claimed to be prepared by DW1, was signed by the firm.

DW1 had also assumed that the plaintiffs suffered a loss due to the delay in the commencement of the project. She failed to base her report on the fact that the plaintiffs were claiming damages for breaches of undertakings on the part of the defendants as stated in the order of the court referred to earlier.

DW1 used what she referred to as a 'comparison' approach. According to her, if the project had commenced in 1993, then the plaintiffs' profits would have been higher than if the project had commenced in 1988. As such, the plaintiffs would not have suffered any loss.

This 'comparison' approach is not without flaws for the following reasons. DW1 admitted under cross-examination that there was no reason for the plaintiffs to delay the commencement of the project from 1988 to 1993. She also stated that she was not saying that the project, if delayed until 1993, would have earned better profits. She admitted in her evidence that all projections are not precise. If there was a recession, the profit would be

less, and if there is a civil unrest the property market would collapse, thereby causing the plaintiffs financial disaster. In making her computation for 1993 DW1 assumed that the cost of building the houses remained constant for eight years without taking into account the increase in building costs. She admitted in evidence that she did not adjust her calculation in regard to the increase in the cost.

The comparison approach adopted by DW1 is an attractive argument, but no consideration was given to the fact that between 1993 and 2001, there could be many fluctuating market conditions that may well render the project a failure financially.

Both PW1 and DW1 admit that there would be a valid claim by the plaintiffs for loss of profit if the project had commenced in 1988. They differ only in the amount of profit. Notwithstanding the fact that both PW1 and DW1 gave evidence that there would be a valid claim by the plaintiffs for loss of profit if the project commenced in 1988, in terms of experience, PW1 had more practical experience of the housing industry than DW1. Having seen and heard both PW1 and DW1 giving evidence in court, I prefer the testimony of PW1 to that of DW1, although in my assessment of his evidence, I have made some allowances for errors in the estimated profit.

The court is entitled to consider the fact of loss of profit suffered by a party to a contract in suitable circumstances. This principle of law was illustrated amply in the recent case of *Bank Bumiputra Malaysia Bhd Kuala Terengganu v Mae Perkayuan Sdn Bhd & Ors.*[2] In this case, the respondent had obtained overdraft facilities from the appellant for the purpose of a bridging loan in order to develop a certain piece of land in Dungun, Terengganu, and also to purchase a certain piece of land in Alor Gajah, Melaka. The appellant withdrew these loan facilities and sued the respondent for the payment of outstanding moneys due to the bank. The respondent counterclaimed for breach of contract and damages.

In the course of the hearing of the *Bank Bumiputra* case,[2] the respondent adduced evidence to show that in the Dungun project, the respondent would have made a certain amount of profit, and the court assessed the amount of profit at RM5,394,722. The court also held that on the facts and evidence, the loss of profits which the first respondent would suffer on the Dungun project was a natural and probable result of the appellant's breach of contract. The court held that it was clear that at the time of entering into the loan contract with the first respondent, the appellant knew of the loss which would be incurred by the first respondent should the bank breach the contract.

In the instant case, the facts are somewhat similar to the *Bank Bumiputra* case.[2] The defendants knew at the time the contract was executed that if there was a breach of contract and they did not honour their undertakings, the plaintiffs would suffer a loss, as the land had been purchased with a view to developing it into a housing project. The loss suffered by the plaintiffs was a natural and probable result of the defendant's breach of the contract.

I do have to bear in mind that in the *Bank Bumiputra* case,[2] the project was already in progress when the loan was stopped, and in the present case

it was not so. The commencement of the project depended entirely on the first defendant who was to provide the loan, and the profits expected were projections which may or may not have adversely affected the anticipated profits. Therefore this factor should be borne in mind in my assessment of the damages.

There have been two different computations in regard to the loss of profits made by PW1 and DW1. Taking all factors into consideration, I take an average of the two figures relating to the loss of profits on the basis that the project started in 1987/88. The average of the two figures relating to the loss of profits amounts to RM19,113,500. However, there could be adverse conditions affecting the anticipated profits and a deduction of a reasonable percentage of 30% should be applied to the sum which is thereby reduced to a round figure of RM13.5m. I accordingly award the plaintiffs a sum of RM13.5m as damages for loss of profits.

The next item of loss claimed by the plaintiffs is loss of opportunity cost. Both PW1 and DW1 agreed that it was reasonable to assume that there was an increase in the value of property in regard to this item. In regard to cash flow investment, both PW1 and DW1 agreed that there was such a loss. PW1 had stated that the loss would amount to RM1,410,900, whereas DW1 stated that it would amount to RM325,028. In the circumstances, the average of the two figures would amount to RM867,969. I would therefore allow the sum of RM867,969 in regard to the item of loss suffered in regard to cash flow investment. On the evidence before me there is no basis for the other claim under the heading of loss of opportunity cost of RM2,869,300. I accordingly disallow this item.

In regard to the claim of future profit, this really amounts to a claim for exemplary damages against the defendants. The principles for an award of exemplary damages appear in the case of *Rookes v Barnard*.[3] In the instant case, the plaintiffs have not established their claim in accordance with these principles. I therefore disallow the claim for RM5m.

The plaintiffs also made a claim for interest on the amount of RM4,793,995.80. This amount was the 10% deposit paid by the plaintiffs to the defendants in compliance with the terms and conditions of the agreement for sale. It was argued by the plaintiffs' counsel that the defendant had terminated the agreement without any legal basis, and this was so held by the court. As such, the plaintiffs had been denied the use of that sum of money. It was further argued that the second defendant had the use of the money since 20 August 1984 until 31 December 1992 and the forfeiture of the said money by the defendants was unjustified. The defendants by wrongfully terminating the agreement must in all fairness compensate the plaintiffs. The plaintiffs claim 8%pa interest on the 10% of the purchase price of the land paid to the defendants on 20 August 1984 (date of the agreement) to 31 December 1992 (when the plaintiffs paid the balance of the purchase price). However, I hold that the plaintiffs' claim for interest of 8%pa on the 10% of the purchase price should commence from the date the agreement was wrongfully terminated, ie 12 December 1988, till the balance of the purchase price was paid by the plaintiffs to the defendants on 31 December 1992. This figure amounts to RM2,279,290.52 arrived at as follows:

Deposit of RM4,793,995.80 paid on 20 August 1984.
Date of termination: 12 December 1988.
Calculation of interest at 8%pa.

	Principal	Interest	Total
12 December 1988	4,793,995.80	383,519.66	5,177,515.46
12 December 1989	5,177,515.46	414,201.23	5,591,716.69
12 December 1990	5,591,716.69	447,337.33	6,039,054.02
12 December 1991	6,039,054.02	483,124.32	6,552,178.34
12 December 1992	6,552,178.34	521,774.26	7,043,952.60
31 December 1992	7,043,952.60	29,333.72	7,073,286.32

The total interest (7,073,286.32 - 4,793,995.80) = 2,279,290.52.

I would accordingly allow damages under this item for the sum of RM2,279,290.52.

The defendants also called DW2 who is a chartered valuation surveyor. The gist of his evidence is that the value of the said land in 1988 was RM54m, and the present day value of the land is RM120m. He also submitted a report marked D6. Counsel for the defendants submitted that as such, the plaintiffs would have made a profit beyond the amount claimed by them by way of damages. He was shown a document D5 which stated that the valuation of the land by the Government in 1993 was RM67m. DW2 in his report, D6, at p 2 stated categorically that he based his open market value of the land in question on the following *assumptions* that:

(i) [there was] a willing seller and a willing buyer dealing at arm's length;
(ii) [there was] a reasonable period within which to negotiate the sale, taking into account the nature of the property and the state of the market;
(iii) values will remain static throughout the period of negotiation of sale;
(iv) the property will be freely exposed to the market; and
(v) no account is to be taken of an additional bid by a special purchaser.

It is my view that the evidence of DW2 is based on a series of assumptions. Therefore, there is no degree of certainty that the value of the land stated by him can be arrived at on a reasonable and factual basis. When a witness starts to assume certain facts to be prerequisite before arriving at a conclusion, then his evidence cannot be accepted on the basis that it is reasonable and credible.

First of all, is there any credible evidence on record that there is a willing buyer for the said land? We are not discussing the sale of a small parcel of land, but that of a large parcel of land, amounting to 1,000 acres. No evidence was adduced by the defendants that there was a ready or prospective purchaser of the said land for a price of RM120m.

DW2 went on to state that he also assumed that values would have to be static throughout the period of negotiation for the sale of the land. Again, this assumption by him is not without a flaw. What if the value of land is reduced drastically due to circumstances and market conditions. Again, DW2 bases his opinion on the sale of certain pieces of land in 1991,

namely, items 3 and 4 of Sch III of his report, D6. The market conditions could vary in August 1993 by the time DW2 gave evidence in court.

It is admitted that the value of the said land would have appreciated between 1984 and 1992, but there is no cogent evidence before the court as to the actual extent of the increase in the value of the said land. That leaves the court to speculate on the increased value of the land. To do so would be totally unsatisfactory, bearing in mind that there was no evidence before the court of the fact that there were any prospective purchasers of the said land. Therefore, in conclusion, I wish to state that the defendants' submission that the increase in the value of the said land would offset any damages suffered by the plaintiffs is not supported conclusively by the evidence of DW2 for reasons mentioned above.

It must be borne in mind that the plaintiffs purchased the piece of land for the purpose of development, and not for sale. This has been made clear in the argument made by the plaintiffs and the defendants.

In any event, the defendants are inconsistent in their stand. Having stated that if the plaintiffs had developed the land in 1993, it would be profitable for the plaintiffs, they also state that the plaintiffs could also sell that land to offset loss of profits. This shows that the defendants themselves are uncertain as to what course of action the plaintiffs should take.

Lastly, I award in favour of the plaintiffs interest at the rate of 5%pa on all the awards of damages (except for the sum of RM2,279,290.52) for a period from the date of service of the writ until the date of judgment under s 11 of the Civil Law Act 1956 and thereafter at the rate of 8%pa until satisfaction under O 42 r 12 of the Rules of the High Court 1980.

I also award in favour of the plaintiffs the costs of the action to be taxed by the senior assistant registrar in default of agreement between the parties.

Order accordingly.

Reported by Anne Khoo